

# **Cultural Practices and Children's Rights: The Case of Male Initiation in South Africa**

by

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## **Abstract**

This article focuses on the circumcision initiation of male children which has caused considerable controversy in South Africa because they are taken to initiation schools against their will, and in some cases, without parental consent. While this raises issues regarding the human rights of children, it is worsened by the alarming number of deaths resulting from botched circumcisions at the initiation schools. Therefore, this article discusses problems associated with the practice, particularly in relationship to children's rights, within a democratic dispensation.

## **Introduction**

The dawn of the constitutional dispensation in South Africa introduced an era predicated on human rights. The country's Constitution (Constitution of the Republic of South Africa Act 108: 1996) introduced as a non-negotiable provision, the supremacy of the Constitution and subjected any law or conduct to passing the constitutional master (Sections 2 and 7 of the Constitution). As could be expected, many practices in South Africa would clash with these constitutional provisions. One such area is traditional and cultural practices. While there are many areas of tension between African traditional and/or cultural practices such as marriage, traditional healing, to mention just a few, this article focuses on initiation of male children which consistently causes considerable controversy in the country for reasons such as children being taken to initiation schools against their will and, in some cases, even without parental consent. While this raises issues regarding the human rights of the children affected, it is worsened by the alarming number of deaths that result from botched circumcisions at the initiation schools. Every year in South Africa, young boys lose their lives due to botched circumcision and some lose their manhood due to amputations, and young girls are subjected to female genital mutilations which affect their sexual organs. All these practices are carried out in the name of culture.

The questions to be asked are, are there sufficient monitoring mechanisms to ensure adherence to the legislative measures in place? Is it sufficient to address the challenges related to these harmful practices particularly male initiation through the law or other strategies need to be employed? These questions are informed by the unsuccessful attempts to regulate male initiation and curb the loss of life at the national level of government.

In 2013 it was reported that approximately 30 initiates in Mpumalanga and about 6 in Limpopo died due to botched circumcision and about 38 were admitted in hospitals due to hydration and excessive bleeding. (Anon at [www.citypress.co.za](http://www.citypress.co.za) May 27, 2013) Though a task team was formed to investigate these deaths, a year later by the 4<sup>th</sup> of July 2014 the Deputy Minister of Traditional Affairs reported the death of 23 initiates and a further admission of 104 initiates at hospitals due to injuries related to circumcision. (Sapa: 2014 at [www.sowetanlive.co.za/news/2014/07/04/initiation-death-toll-at-23](http://www.sowetanlive.co.za/news/2014/07/04/initiation-death-toll-at-23)) Despite the statutes and regulations meant to curb the death and injuries of initiates and the prohibition of genital mutilation in terms of section 12(3) of the Children's Act, (38 of 2005) the statistics shows that in some areas of the country the fatalities are still continuing. Is it non-compliance to the law or lack of understanding thereof that is failing the boys seeking manhood?

This article, therefore, discusses the nature of the problems associated with the practice of male initiation, particularly in relation to children's rights within a democratic dispensation; obligations of the state, parents and guardians or care-givers at initiation schools. In addition to existing legislation in this regard, South Africa has ratified or signed many treaties protecting the rights of children and women. It is a member to international communities like United Nations Convention on the Rights of the Child (UNCRC), African Charter on the Rights and Welfare of the Child (ACRWC), Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and Universal Declaration of Human Rights (UDHR). Section 39(2) of the Constitution requires a court, tribunal or forum to consider international law in the interpretation of the Bill of Rights. The relevant articles in the ACRWC for the protection of initiates in the traditional practice of circumcision are Articles 16 and 21 respectively which states that children should be protected from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment and governments should do what they can to stop harmful social practices that affect the welfare and dignity of children. At the center of this article is also the question whether South Africa complies fully with international norms and standards with regard to protection of children's rights.

## **What Initiation Entails**

Initiation is an African custom that varies from group to group. The ritual takes place at initiation schools in the bush where it is usually performed by experienced traditional practitioners and is often performed on males and in some cultures on females. (Matshoba 2014) Tens of thousands of young South Africans take part in traditional ceremonies each year where circumcision is normally performed by traditional leaders. Unfortunately initiation has fallen into the hands of young and inexperienced men or fake traditional healers in quest for quick money making schemes.

According to the report on Public Hearings on Male Initiation Schools in South Africa (Commission for the Promotion & Protection of the Rights of Cultural, Religious & Linguistic Communities: 2010) many young people are finding ways of making money out of the initiation practice. This was seen in the mushrooming of initiation schools that are neither authorized nor monitored and most of these are found in the townships, kidnapping and recruiting of underage initiates for a fee, initiates are often required to pay exorbitant fees. In addition, some traditional surgeons abuse their positions of power. They are often inadequately trained to perform circumcision to mention a few (*Ibid*). However, the custom has also recently received widespread scientific backing as a preventative measure against HIV infections, including from the World Health Organization and the United Nations (WHO at <http://www.who.int/hiv/topics/malecircumcision/en>). It also lowers the risk of other sexually transmitted diseases, penile cancer and infant urinary tract infection according to studies carried out by the Center for Disease Control and Prevention (Anon <http://www.cdc.gov/hiv/prevention/research/malecircumcision>) On the contrary there is a high health risk to initiates or males undergoing circumcision due to botched circumcision. Among cultural groups in South Africa such as the *Vhavenda*, *Amakhosa*, *Tswana* and *Bapedi*, circumcision is performed at initiation schools where young men are prepared for manhood. The ritual often requires seclusion as well as painting of the body, changed clothing to demonstrate that they are in a period of transition (Venter 2011: 88).

### **Purpose and Phases of the Initiation Process**

The purpose of initiation is basically to prepare young men for manhood. They are also taught skills on issues of sexuality, courtship, marriage and respect for elders. Those who undergo hospital based circumcision risk not only being treated as social outcast, but also forfeiting community privileges and marriage opportunities (Venter 2011: 89). According to Venter (*Ibid*) there are three phases of initiation viz: the first phase is separation which commences with the building of the lodge/hut, appointment of host and functionaries; well-coming ceremony which also involves the slaughtering of a goat for each boy who is then required to eat the right shoulder of that goat. The second phase is the transition phase. During this phase initiates are considered to be contaminated and certain rituals are conducted on them such as the shaving of their heads, smearing their bodies with white clay which is believed to ward off evil and left in the hut for a week, circumcision and in some cultures physical challenges such as the stick fighting. The methods and the rest of the practices carried out in those secluded areas are kept a secret. The final phase is the integration phase which takes place at the end of such initiation. It may be after three months, six or three weeks depending on the duration of the initiation process. This phase is characterized by the following: white clay is washed from the initiate's bodies and their heads shaved; they return to the hut where their fathers, dignitaries and traditional guardians wait; they sing and dance.

## **Challenges Associated With Male Initiation at Initiation Schools**

Despite the dignified cultural significance and value of initiation process, the practice has been associated with botched operations, which, in some instances, have left many initiates infected with HIV, some losing their genital organs, and others dying of complications at and outside the initiation school (Malisha 2008: 585). These procedures can also lead to serious illness or death if they become infected and are therefore dangerous as well as painful (Schlegel & Barry 2017: 5). After every initiation season there seems to be casualties. One therefore, questions the adequacy of the current legislative framework in protecting the rights of initiates; parental responsibilities and rights of parents, guardians and care-givers towards the children who undergo initiation process. Indeed there seems to be an effort on the part of government but there are still deficiencies in legislation regulating the practice in provincial and at national level. The safety of initiation schools and the protection of initiates during the period they are at those initiation schools seems not to be measured against the individual rights in the Bill of Rights. The burning issue is also whether to allow initiation schools to continue operating or whether to switch to modern medical methods.

According to Malisha (*ibid*) the people who are not exposed to male initiation are of the view that the practice is old-fashioned and should be replaced by modern ways of undergoing circumcision. In light of these inadvertent mishaps, it becomes relevant to ask if initiations are really in the best interests of the child when they are likely to result in irreparable physical harm and the accompanying loss of self-worth for victims of such botched and unhealthy practices.

## **Legislative Challenges: Obligation of the State to Protect Children**

The Constitution plays a pivotal role in the protection of children and it contains the Bill of Rights which contains provisions concerning children's rights (Chapter 2 of the Constitution). Furthermore, the United Nations Convention on the Rights of the Child (the Convention on the Rights of the Child (1989) was ratified by South Africa on June 1995) and the OAU Charter on the Rights and Welfare of the Child (South Africa ratified this convention on the 9<sup>th</sup> of July 1996. It is a regional human rights instrument adopted by the defunct Organisation of African Unity) and the Children's Act (38 of 2005) gives effect to individual and children's constitutional rights. The Conventions mentioned above will also be considered as it is imperative to establish whether the South African state has discharged its international obligations with regard to protection of children particularly with regard to protection against harmful cultural practices. Since the inception of the Constitution in South Africa, it has become crucial to protect women and children as the most vulnerable members of the society. Therefore, cultural practice such as male initiation that is often not practiced within the confines of the law seems to offend against some of the rights of children as enshrined in the Constitution. The fundamental rights which are infringed by the cultural practice of circumcision where the consent of an initiate is not sought are, *inter alia*, equality; human dignity; right to life; freedom and security of the person; privacy; freedom of religion, belief and opinion; health care, food, water and social security and the rights of children under section 28 of the Bill of Rights. On the contrary, the state intervention in the regulation of the practice of circumcision is deemed as an infringement of section 31 of the Constitution, 1996.

As a starting point, section 28(2) of the Constitution states that the best interests of the child are paramount in every matter concerning the child. In essence, the ‘best interests’ of the child is identified as the criterion against which a State Party has to measure all aspects of its law and policy regarding children. This principle is therefore constitutionally entrenched and male initiation certainly in some cases would seem not to be in the best interests of the children concerned. In the same light, the Children’s Act (38 of 2005) highly recognises the importance of the “best interests of the child” (Section 7(1)). It speaks of the need to protect the child from any physical or psychological harm that may be caused by subjecting the child to any harmful behavior. Furthermore, section 28 (1) (b) places a duty on the parents and family of children to provide care and, by implication, also places a duty on the state to support the institution of the family (Currie I and De Waal 2005: 605). However, it is interesting to note that, often young children are separated from their mothers the reason adduced is that according to custom, women and uninitiated men are not allowed near the initiates. Furthermore, it is submitted that the separation itself is meant ‘to break an excessively strong dependence upon the mother and to ensure identification with adult males and acceptance of the male role.’(Schlegel and Barry 2017: 7-8) This clearly infringes the child’s right to be cared for by parents, alternatively care givers and members of the child’s extended family as it is often the case in African custom. To deny mothers contact with their children is certainly not in the best interests of the child concerned. Parents are responsible to care for their children and to maintain contact with them (See Section 18 of the Children’s Act).

Section 30 of the Constitution provides for everyone the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provisions of the Bill of Rights. In essence, a right to culture may therefore be exercised if it does not conflict with other provisions of the Bill of Rights. Similarly, section 31 provides that people who belong to a cultural community have the right to enjoy their culture. The right to culture is one of the fundamental human rights that is generally acknowledged and protected (Mswela 2009). However, this right is subject to the enjoyment not being exercised in a manner that is inconsistent with any provision of the Bill of Rights (Section 31(2) of the Constitution). It can therefore be assumed that the wording of the section intend to mean that when circumcision is performed as part of a cultural practice, it must not infringe on the Bill of Rights. However, the clash between culture and the fundamental human rights was raised in the case of *Justice Alliance of South Africa v Yamani* (Case number 1/2008 ECHC (Bisho), where a boy was abducted by his father and traditional leaders; and taken to an initiation school against his will. The court held in its judgment that circumcision is unlawful unless done with the full consent of the initiate. The case was a landmark in demonstrating that any attempts to undermine the fundamental right of individuals under the guise of cultural rights, is a contradiction and violation of the constitutional right of that person.

Evidently, there is a clear possibility that a conflict might ensue between people practicing their culture and children’s rights not being realised/respected. Consequently, it is crucial to indicate which rights are at play and how they might be violated.

### **The Right to Life** (Section 11 of the Constitution)

Everyone including the initiate is entitled to the right to life. This right to life is regarded as the most important right and as the source of all other personal rights in the Bill of Rights, requiring the state to take a leading role in re-establishing respect for human life and dignity in South Africa (Maseko 2008: 191-208). This clause is supplemented by article 21(1)(a) of ACRWC which provides for the elimination of customs and practices prejudicial to the health or life of the child. The death of initiates at the initiation schools is in direct conflict with this provision. The right to life basically places a duty on the state to protect the lives of its citizens including initiates at initiation schools in terms of section 7 (2) of the Constitution. The initiates right to life depends not only on biological existence, cognitive and intellectual ability, but also on material means and access to social goods, which include basic and essential inputs necessary to keep their biological lifelong (*ibid*). Male initiation has been reported to be a danger to human life as there have been cases of loss of life during initiation and even after initiation as a result of botched circumcisions (Anon [www.enca.com](http://www.enca.com) (2014). This implies that the practice of initiation at times results in the violation of the right to life which is constitutionally protected (Section 11 protects everyone's right to life, and therefore every child deserves to have this right protected and this can be fulfilled by practicing safe initiations).

The complications associated with these deaths are infections that occur as a result of the manner in which circumcision is handled (Tarvaiven 2014 at [www.iol.co.za](http://www.iol.co.za) the author explains the story of a boy who had undergone initiation. The boy narrates how they were not allowed to drink anything so as to prevent them from urinating which could affect the cut and only given maize to eat). This leaves children more vulnerable to this practice, and necessitated the need for the state to take drastic measures to protect children's rights and eliminate the loss of lives in the process of initiation.

### **The Right to Dignity** (Section 10 of the Constitution)

According to section 1 of the Constitution, the Republic of South Africa is founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms (See Currie and De Waal 2005: 272). The value of human dignity is therefore safeguarded and promoted *inter alia*, by the recognition of a right to dignity in the Bill of Rights (Section 10 of the Constitution). Section 10 of the Constitution also provides that every individual has the inherent dignity which must be respected and promoted. Devenish observes that the right to human dignity as envisaged by section 10 is phrased in a broad general language and it covers a wide range of circumstances which involves freedom from disease, a clean and healthy environment in which life is tolerable (Devenish 1999: 83). This also extends to boys who undergo initiation as they are entitled to the respect and protection of their dignity. In light of the fact that initiation involves different rituals this could potentially be an issue that violates the dignity of children.

Some of the rituals performed involve the young boys chanting and dancing naked with nothing covering their bodies in cold conditions (Du Plooy at [www.carltonvilleherald.com](http://www.carltonvilleherald.com) (2012). Further, considering that dignity entails the self-worth of an individual, the parading of these boys when they are semi naked, something which they wouldn't do in their ordinary lives could also be a violation of their right to dignity. The fact that they have to parade themselves naked in front of each other unwillingly invades someone's right to dignity and this could affect other children. For instance, some might ridicule others in relation to their private parts and this can affect children's self-worth and self-esteem.

### **The Right to Health Care (Section 27 of the Constitution)**

Section 27 provides for the right to have access to health care, food, water and social security (Currie and De Waal 2005: 591). The initiates right to have access to food, water and health care is guaranteed under the Constitution ((Section 27(1) (3) (b) of the Constitution states that everyone has the right to have access to sufficient food and water; and no one may be refused emergency medical treatment).It can be safely interpreted as to mean that during and after circumcision, the initiates must get proper care needed for the wellbeing and survival. In practice and during the course of initiation, sometimes the initiates do not receive proper medical attention and the manner in which they are circumcised without any medication or sedation and even no proper medical sterilization of the instruments used is life risking. Currie and De Waal are of the opinion that health care services are not defined, but must include proper medical care, and diagnosis of diseases and vaccinations, ( Currie and De Waal 2005: 450). The perception presented is that being able to endure the pain without any medication is a sign that one is a man even though it could compromise the life of an individual (Louise 2008: 450). Furthermore, initiates are often deprived of food and water, exposed to winter temperatures with only one blanket to protect them and beatings and assaults are often a part of the ritual. The reason of this deprivation it is said is to prevent the initiates from urinating which could affect the cut (Venter 2011). These deprivations could be potential violations of section 27.

### **Freedom and Security of a Person (Section 12 of the Constitution)**

Furthermore, section 12 of the Constitution provides for the right to freedom and security of the person. This includes the right of everyone not to be deprived of their freedom arbitrarily (Section 12 (1) (a)) and the right to be free from all forms of violence (Section 12(1) (c)). Additionally, every individual is entitled to bodily and psychological integrity which includes the right to security in and control over their body (Section 12 (1) (b)). There are reports that at times young boys are forced to attend the initiations against their will ("Some of these children were sent for initiation by consenting parents, whilst others were allegedly kidnapped and taken against their will and without their parents knowing"). This could result in potential violations of the rights to freedom and security of the person. In addition, what if a male child does not want to be circumcised?

The forced initiation could thus be in violation of the child's bodily integrity and the security in and control over their body as provided for in section 12(2) (b). Section 12(2)(d) and 12(2)(e) respectively provides for the right not to be tortured in any way and not to be treated or punished in a cruel, inhuman or degrading way. Often some of the reasons advanced for torture at the initiation schools are that the punishment instills endurance in the initiates (See Venter (2011) at 87-97). Culture cannot be used as an excuse for assault because in reality rituals that inflict pain prepare boys for later aggressiveness as a masculine pose (Schlegel and Barry 2017). In the unreported English case of *R v Adesanya* (1974 Unreported) where a Nigerian woman living in England was charged with assault after cutting the faces of her children in celebration of her culture, the court held that culture cannot be raised as an excuse against child abuse or any activity which is contrary to the law. Sometimes as it is with the Xhosa culture, circumcision is done with a blunt spear also infringe upon children's right to freedom of security of the person (Section 12 (1) (d) and (e) and S 12 (2) (b)). The significance of the spear and drawing of blood during these rituals is also considered as an act to appease the ancestors (Venter 2011). This could also not only be seen to offend the religious believe of a child if the child who is abducted is a Christian but also such surgical procedures which are often carried out in the bush which apparatus which are not sterilized or cleaned up after use could spread diseases which are transmitted from one initiate to the next Initiates are exposed to blood infections such as HIV virus, sexual transmitted diseases, gonorrhea and other illnesses such as Hepatitis B (*ibid*). If things go wrong during initiation process amputation of a part of the body also leads to the loss of bodily integrity. This procedure threatens the health care and security of the initiates. Furthermore, Initiates who end up in hospitals are considered to have failed the test of manhood. They are ostracized and called by derogatory names by the communities they live in. The discrimination of boys who are uncircumcised and those who failed to successfully complete the initiation seems to be exacerbated by the custodians of these cultural practices like the Traditional leaders. This was evident in the comments made by Traditional leaders ahead of the *Yamani* case where the Eastern Cape Contralesa chairperson Chief Mwelo Nonkonyane was quoted as saying that those who refused traditional circumcision should be ostracized by the community (Smook 2009 at <http://www.iolnew.co.za>).

From the discussion above it is clear that the Constitution permits people belonging to a cultural group to practice their culture freely provided that the practices ought to be in line with the provisions of the Bill of rights (Section 31 of the Constitution). However, it has been clearly shown that, the targets of male initiations are predominantly young boys who are not yet adults and the Constitution protects the rights of children as defined in the section 28 and various sections of the Children's Act (38 of 2005). In the light of the above, it is evident that there are competing interest and rights associated with the practice of male initiation. On the one hand, there are rights of communities" to maintain and practice their culture and on the other there are various rights that are afforded to children through the Bill of Rights and the Children's Act and which are clearly violated by the custom. It moreover lists other additional children's rights in section 28. Arguably, the Children's Act is the main statute protecting the rights of children in South Africa.



## **The Children's Act 38 of 2005**

To give effect to children's rights as contained in Section 28 of the Constitution, 1996 the legislator promulgated Children's Act (38 of 2005). The Act seeks to provide legal protection against unconsented male circumcision; and it completely prohibits female genital mutilation (Section 12). The point of departure with regards to the Children's Act is that the best interests of the child must be sought and throughout, sections of the Act affirm the need to respect for a child's cultural attachments. Section 12 (1) provides that every child has a right not to be subjected to social, cultural and religious practices which are detrimental to his well-being. A child also has the right to belong to a cultural group that he or she wishes to belong to (Section 7). The Act regulates the protection of children's rights in cultural practices as well as male circumcision (Section 12 (10) states that maturity and stage of development of a child must be taken into consideration). The Act has provisions relating to the circumcision of male children under the age of 16 years, with two exceptions, namely religious and medical circumcision (Section 12(8)). This suggests that the Act does not support the circumcision of minors unless it is for religious reasons or medical reasons. Nevertheless as indicated in this article, some communities encourage, force and even abduct boys who are below the age of 16 years to attend initiation. The Act in section 12(9) (a) further states that, any male child above the age of 16 may be circumcised only if that child has given consent to be circumcised in that manner. Furthermore, the Act is clear that male children may not be circumcised if they are under the age of 16 years. It is therefore submitted that, despite these provisions young children are still forced into initiation with total disregard of their rights.

The Children's Act also provides for the right of any male child to refuse to be circumcised, taking into consideration the child's age, maturity and stage of development (Section 12 (10)). However, because of peer pressure, community stigma and even personal convictions, most young boys do not have the courage to refuse (Bosman-Sadie and Corrie 2010: 28). For the parents, the implication is that, those parents who force their children to undergo traditional circumcision against their will are contravening the Act and violating the rights of the child. No penalties are provided for contravening this section but anyone, including doctors who undertake such procedures could face a common law civil action for damages from the circumcised child for breaching the provisions of the Act (Mcuid-Mason 2013). The Children's Act further provides that, cultural circumcision should be done by a medical practitioner or a person with knowledge of the social and cultural practices concerned and who has been properly trained to perform circumcisions (Children's Act Regulation 5(1) (d)). Similar provisions govern religious circumcision which may be performed by a medical practitioner or by a person from the religion concerned who has been properly trained to perform circumcisions (Children's Act Regulation 6(1)). However, in practice circumcision at initiation schools continues to be conducted randomly on young children some having been abducted. It is submitted that in some communities there is a total disregard for the existing legislative framework on circumcision and initiation schools.

## **Application of Health Standards in Traditional Circumcision Act (6 of 2001)**

The Act was enacted in order to apply health standards necessary for the prevention of injury and loss of life during initiation and traditional circumcision (Vincent 2008: 34). Section 7 of the Application of Health Standards in Traditional Circumcision Act (6 of 2001) provides specifically for consent by a parent or a guardian where an initiate is aged below 21 years. The consent must be furnished in writing on a prescribed form. According to the Act, proof in the form of a birth certificate or an ID document of the initiate is required (Section 7 (1)). This proof is to show that the prospective initiate in respect of whom permission to circumcise is requested is at least 18 years old or, if the parents so specifically request, is at least 16 years old (Section 7(2)).

The Application of Health Standards in Traditional Circumcision Act also requires the designation of medical officers to exercise functions in terms of the Act, whereupon it is then required that any circumcision in the province to be performed only after written permission has been obtained from the medical officer designated for the area in question (Sections 2-5). The medical officer may impose conditions prescribing or supplying a proper surgical instrument where the use of a particular instrument has been disallowed (Section 4(1)) within a month of applying for written permission to perform a circumcision, the applicant is required to submit proof of compliance with the conditions imposed by the medical officer, failing which the permission lapses (Section 5(4)).

Health standards are also provided for in Annexure A of the Act which provides that the traditional surgeon must be known to the parents of the prospective initiate and must use instruments approved by the parents or guardians, unless the medical officer has authorized the use of another surgical instrument. As a means to ensure compliance, the Act provides for criminal penalties (Section 9(2)). Up to R1000 or six months imprisonment are prescribed for contravention of the provisions concerning consent, and R10 000 or ten years imprisonment for performing circumcisions without a permit or failing to comply with any condition imposed by a medical officer is the penalty set (Section 9(2)). Despite this legislation, initiation schools continue to flaunt the rules and risk the lives of initiates.

In addition, provincial governments such as those of Limpopo, Eastern Cape and Free State have enacted laws to safeguard the wellbeing of the initiates and these are discussed below.

## **Northern Province Circumcision Schools Act 6 of 1996**

The Act is a provincial statute which provides for a prohibition on holding of a circumcision school without a permit issued by the premier of the province, who may issue such permits upon conditions as he or she may deem desirable (Sections 2 and 3). The police are further authorised upon receipt of a complaint or oath that a person is reasonably believed to have been abducted or forcefully taken to a circumcision school, “to rescue such person in an orderly manner” (Section 5). This is a clear indication on the part of the provincial authority that it has taken steps to try and protect children.

The Act also regulates the permit requirements to operate a school, age of initiates as well as the duration of the initiation period (Section 16). Furthermore this Act clearly instructs the prohibition of abductions and that any person who is found to have forced or abducted initiates upon realization the permit holder of the school will be ordered to release that person (Section 11).

### **Free State Initiation School Health Act 1 of 2004**

The Act is a provincial statute promulgated within the Free State and which regulates both medical and environmental aspects of initiation (Section 2(2) (d)), local authority, traditional authority (Section 2(2) (a) and (b)), parental consent where a prospective initiate is less than 18 years of age as well as proof of experience and expertise in holding an initiation school (Section 2(2) (e)). The Act also requires the consent form to be signed by a parent or guardian of the initiate where the initiate is below 18 years old (Section 5). Environmental factors regulated by the Act include inspections by an Environmental Health Officer of initiation schools to ensure that there is an adequate supply of clean water, acceptable toilet and bathroom facilities, hygienic preparation of food, and adequate shelter against the natural elements. It further includes that instruments used are kept, prepared and used in a manner that will not place an initiate at risk of injury, disease or death (Section 10).

In an effort to synchronize culture with law the Constitution on section 185 allowed the establishment of Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. The primary objective of the Commission is to promote, respect, and develop the rights of cultural, religious and linguistic communities. It should also create peace, friendship, humanity, tolerance and national unity amongst cultural, religious and linguistic communities on the basis of equality, non-discrimination and free association.

### **An International Perspective on Children's Rights**

#### **Convention on the Rights of the Child (1989)**

The United Nations Convention on the Rights of the Child (CRC) (South Africa became a signatory on the 16<sup>th</sup> of June 1995), is a legally-binding international agreement setting out the civil, political, economic, social and cultural rights of every child, regardless of their race, religion or abilities (Thomson 2003 at [www.savethechildren.org.uk](http://www.savethechildren.org.uk)). It incorporates the child's best interests and stipulates that the best interests of children must be the primary concern in making decisions that may affect them (Article 3). The (CRC) has provision for cultural practices in article 24 which deals with the right to health. The standard set in article 24(3) is that State Parties are required to take all effective and appropriate measures with a view to abolishing traditional practices which are prejudicial to the health of children (Sloth-Nielson 2012: 72).

Article 5 of the CRC requires state parties to protect children from all forms of torture and inhuman or degrading treatment, especially physical or mental injury or abuse, neglect or maltreatment (Venter 2011). Male initiations and initiation schools in South Africa have in preceding years been very harmful to the health of initiates even resulting in death of initiates (Ndaki 2002). The conditions of initiates spending winter in the bushes without warm clothing and medication to treat their circumcised reproductive organs worsens the situation (*ibid*). It is therefore incumbent on the South African government to eliminate any traditional practices that affect or have potential to affect children's health and total well-being. State bodies, for example the provincial head of Social Development, must immediately be informed when a child is maltreated (Venter 2011: 93).

### **The African Charter on the Rights and Welfare of the Child (1990)**

The African Charter on the Rights and Welfare of the Child (Article 16), states that children should be protected from all forms of torture and inhuman or degrading treatment especially physical or mental injury or abuse, neglect or maltreatment. Some of the male initiation schools that have been operating subject initiates to inhuman torture and degrading treatment, forcing someone to male circumcision is an invasion of that person's physical integrity. Furthermore, it has been argued particularly with reference to Xhosa initiates that they also suffer from a loss of privacy, both in the initiation school and in the community (Venter 2011: 75). People in the community are bound to have knowledge on what transpired during the processes, information of those that were brave and those that were not can cause mental stress on children (Ibid). Furthermore, the Charter states that it is an obligation of states (Full article 1 is headed "Obligations of States Parties"), to discourage, to the extent of their inconsistency, "any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations" contained in the Charter (Art 1(3)).

From the above, it is clear that the international and regional treaty provisions mandate state parties to take the necessary legislative steps to ensure that harmful cultural and religious practices are prohibited. Certain that South Africa is a party to International law, the national and provincial legislatures, there is an obligation to regulate on initiation and initiation schools in order to be successful to protect children's rights.

Clearly the cultural practice of circumcision as carried out in South Africa is in conflict with and violates several international human rights instruments as stated above. Article 16 of ACRWC stipulates that children should be protected from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse. Based on the fatalities in some of the initiation schools, there is defiance of the international laws.

## Conclusion

Culture is a vital part of African traditions that cannot be easily dispensed with (Kitui 2012: at [africlaw.com](http://africlaw.com) 2012/06/07/female-genital-mutilation-in-sol), and it is clear from the discussion above that, there had been considerable efforts at both national and provincial government levels within South Africa to regulate initiation process and protect children's rights. The Children's Act gives effect to individual and children's constitutional rights. There is also an agreement that the survival and protection of children are of paramount importance and should be guaranteed by the state. South Africa has an obligation in terms of international law to protect children's rights against harmful cultural practices. Since the Constitution is the supreme law of the country and any law or conduct that is inconsistent with it invalid, the obligations imposed by it must be fulfilled (Section 2). In terms of section 7(2) of the Constitution the state must respect, promote, protect and fulfil the rights in the Bill of rights. It follows, therefore, that the state is under a constitutional obligation to regulate initiations and to protect children from life threatening incidents (Currie and De Waal: 2001). However, in reality the Constitution does not guarantee the safeguarding of children's interests. This can be seen in the number of recorded deaths, injuries, deadly infections, incompetent traditional surgeons, abductions and forced entry into initiations and initiation schools that are all happening within the existing legislative framework. It is therefore, submitted that, there is a lack of adequate enforcement of the laws and awareness by communities about the impact of male initiation on children if not properly practiced and regulated. The State had to intervene and protect the lives of initiates as obligated by section 7(2) of the Constitution. This also constitutes a good reason for limiting the right to practice traditional circumcision as envisaged by section 36 of the Constitution. While everyone has the right to participate in the cultural life of their choice, cultural rights may not be exercised in a manner inconsistent with the provisions of the Bill of Rights (Section 30 of the Constitution). In preserving the cultural importance of traditional male circumcision and improving the safety of initiates, Traditional leaders, health practitioners and all other stakeholders must work together. There must be a working relationship between traditional surgeons, traditional nurses, traditional leaders, traditional healers, officials from the department of Health, the police and the community (Buso 2007; at <http://www.ncbi.nlm.nih.gov/pubmed/17599221>). Every year before the initiation season commences it is essential that training workshops be conducted directed at all stakeholders. Educating community leaders is likely to achieve the intended results of effectively regulating the traditional practices if traditional leaders support these initiatives people are likely to do the same. Besides community leaders want to feel that they are in control (Maimela 2009). Together we can do more.

However, my personal view is that, this custom is outdated and it is not in the best interests of the child to subject them to the initiation process. Currently, the only protection the law provides with regard to male initiation is the right not to be subjected to genital mutilation and the right to refuse circumcision (See sections 12 & 12(8) of the Constitution). There are many issues of concern, for example, often young children are separated from their parents and exposed to cruel rituals such as slaughtering of animals to appease the ancestors. Children need to be protected from such exposure.

If the child is a Christian, then certainly this practice will possibly offend his religious beliefs. In some cultures, these young men and boys engage in stick fights to determine the ranking among them. It is submitted that this practice promotes violence which the boys later perpetuate within their own communities. It is further alleged that once these young men and boys return from initiation schools they turn to disrespect their mothers and older men in their communities who have not been to initiation schools. This clearly indicates the manner in which initiates are orientated on issues of manhood which ultimately undermine the value of respect and equality between man and women in our society. Whatever is taught at initiation schools can be incorporated into the school curricula in the form of life skills that are taught from foundation phase at primary schools in public schools. Traditional leaders can make valuable contributions in this regard.

I finally submit that, although this custom originally was well practiced it is no longer relevant in an era where there are health facilities such as hospitals and clinics where it could be done safely at no cost. It is submitted further that, once legislation is required to regulate a custom, then something is wrong with that custom. It is time the government begin to seriously reflect on the custom. What purpose does it serve? Certainly one does not become a man by having his foreskin removed in the bush. What is it that you teach a nine year old traumatized by his abduction? Initiation schools are not supposed to be renowned for causing deaths and controversy but rather places where young boys are nurtured into men. Nonetheless that should be done in an environment that is safe for the children concerned if not, then the custom must be abolished as it violates children's rights.

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